**UNITED STATES BANKRUPTCY COURT**

**IN AND FOR THE DISTRICT OF ARIZONA**

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| **In Re**<br><br>**MARC S. CANEVA,**<br><br>**Debtor.** | **Chapter 7 Proceedings**<br><br>**Case No. BR-03-20735-PHX-CGC**<br><br>**Adversary No. 04-00822** |
| **SUN COMMUNITIES OPERATING LIMITED PARTNERSHIP, a Michigan limited partnership,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**MARC S. CANEVA,**<br><br>**Defendant.** | **UNDER ADVISEMENT DECISION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT** |

On November 22. 2005. the parties to this adversary proceeding appeared before the Court on Plaintiff Sun Communities Operating L.P.'s ("Plaintiff" and/or "SCOLP") motion for summary judgment and Defendant Marc Caneva's ("Debtor") cross-motion for summary judgment. Plaintiff' alleges that Debtor failed to keep books and records as required by 11 U.S.C. section 727(a)(3), failed to satisfactorily explain a loss of assets. falsified his schedules in violation of Suction 727(a)(4)(a), and committed fraud or defalcation while acting in a fiduciary capacity under Section 523(a)(4). In turn, Debtor argues that summary judgment should be granted in his favor on the Section 523(a)(4) claim due to Plaintiffs failure to present any evidence that Debtor had a fiduciary duty to Plaintiff. At the close of the hearing. the matter was taken under advisement

The rather complicated transaction underlying the parties' relationship is of little import in

addressing the issues presented and, for brevity's sake, will be dispensed with here. What is important is that the facts pertinent to a Section 727(a)(3) analysis are essentially undisputed. The 727(a)(3) dispute centers more on the parties' application of its standard and not the facts giving rise to the claim. Debtor admits, in his latest Amended Statement of Financial Affairs, to being an officer, director, partners, and/or managing director of at least sixteen companies within the six years prepetition. He further admits that for a number of these businesses he has absolutely no records – no corporate formation documents, no tax returns, no financial statements etc. Debtor downplays the lack of records by denying that these entities really carried on any business: "Many of the entities listed in Schedule B and on the Statement of Financial Affairs are either holding companies for other entities or were never opened. As such, records may not necessarily exist. The records that do exist were made available to both Plaintiff and the Trustee" Debtor also argues that he did, in fact, turnover everything that he had, which amounted to boxes and boxes of documents. A similar position was taken at oral argument on the motion for summary judgment.

The problem with Debtor's argument is that it does not properly apply the strictures of Section 727(a)(3). Section 727(a) asks whether the debtor has "failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." As the court in *In re Devaul*, 318 B.R. 824 (Bankr. E.D. Ohio, 2004), stated, the language of the statute focuses on the records the debtor *does not* have, and not what records the debtor does have, which is what Debtor is attempting to focus on here. The question is not whether Debtor turned over all documents that he has pertaining to these various entities or whether the boxes of documents turned over are adequate. Debtor's approach is more akin to a discovery dispute and the adequacy of the turnover of documents: This is a dischargeability dispute, and 727(a)(3) imposes a duty on the debtor to "keep . . . recorded information." The word "keep," moreover, is not synonymous with the word "preserve" in subsection (a)(3). *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 969 (7th Cir. 1999); *In re Devaul*, 318 B.R. at 833. It is not simply a question of whether Debtor failed to preserve or otherwise disposed of the records. Section 727(a)(3) requires those documents normally created in the

operation of a business to exist in the first place.

This obligation goes to the heart of Section 727 – to make the privilege of discharge dependent upon a true presentation of a debtor's financial affairs. *In re Cox*, 41 F.3d 1294 (9th Cir. 1994). It is not a requirement that every minute detail of a debtor's financial and business activity be maintained and produced. *In re Sethi*, 250 B.R. 831, 838 (Bankr. E.D.N.Y. 2000). The initial burden of proof is on the plaintiff to make a *prima facie* case that the debtor failed to maintain and preserve adequate records and that such a failure makes it impossible to determine the debtor's financial condition and "material business transactions" accurately. *In re Cox*, 41 F.3d at 1296 (citing *Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992) (emphasis added)). "Once the objecting party shows that the debtor's records *are absent or inadequate*, the burden of proof then shifts to the debtor to justify the inadequacy or nonexistence of the records." *Id.* (emphasis added). There must be a credible explanation for the failure to keep such records and the burden on the debtor is to establish by a preponderance of the evidence that the failure to keep business records was justified under the circumstances. As the Ninth Circuit stated in *Cox*, "[if] the extent and nature of the debtor's transactions were such that others in like circumstances would ordinarily keep financial records, [debtor] must show more than that she did not comprehend the need for them. . . . In such cases, the justification must indicate that because of unusual circumstances, the debtor was absolved from the duty to maintain records." *Id.* (citing *In re Sandow*, 151 F.2d 807, 809 (2d Cir. 1945)).

This case presents a situation factually different than most cases where the question is whether the information produced was adequate. In this case, Debtor admits not providing *any* documentation on several business entities and transactions, but in the same breath admitting that some had operations or held assets as holding companies. By definition, therefore, the failure to have any documents or records is inadequate. If some of these entities carried on business or had assets, the absence of *any* documents for these entities makes it impossible to determine their value, their significance and their impact on Debtor's estate. He further admitted at his deposition that he owned a 100% interest in some of the companies and a partial interest in others, although documentation to prove his ownership interest are nonexistent. In addition, he acknowledged that for some entities, such as Caneva Investors, Inc., he had no records or books, but that "[i]t was

created by my accountants to be the one percent of the one park, *stuff like that*. They created a lot of companies like that." (Emphasis added). Such disclosure is underwhelming for purposes of adequately determining Debtor's financial condition.

Upon such showing, and Debtor's own admissions, the burden then turned to Debtor to explain why these documents were nonexistent. His explanation falls short. Debtor simply attempts to downplay the significance of each of these companies, although admitting that some had value and operations. If they some were in fact holding companies for other entities, however, *why* are there no documents indicating what they were holding and what, if any, value they had? *Where* are the tax records for these entities? It is not enough to pass of the absence of records as unimportant because Debtor thought the companies themselves were unimportant. In the ordinary course, such documents should exist and would be extremely helpful in independently determining what was held, what was its value, what happened to the assets, and what was Debtor's percentage interest in the entity. *See In re Cox*, 41 F.3d at 1297 (stating that "[i]f the extent and nature of the debtor's transactions were such that others in like circumstances would ordinarily keep financial records, she must show more than that she did not comprehend the need for them. . . . In such cases, the justification must indicate that because of unusual circumstances, the debtor was absolved from the duty to maintain records herself."). Where are the formation documents for the entities? The complete absence of any documents is fatal.

In further support of his position, Debtor simply parrots back in his affidavit the text of Section 727(a)(3), conclusorily denying its elements: "I have not concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records and papers from which my financial condition or business transactions might be ascertained." He does not present an affidavit or other testimony from his accountants who supposedly created these entities and could support his position that nothing exists because there was nothing to document. His offering is simply not enough on summary judgment. Debtor is a sophisticated, educated businessman. He is required to do more.

For these reasons, the Court grants Plaintiff's motion for summary judgment and denies Debtor a discharge pursuant to 11 U.S.C. section 727(a)(3). As a result of the Court's ruling, it is

unnecessary to address Plaintiff's remaining nondischargeability claims under Section 727(a)(4) and 523(a). Counsel for Plaintiff is to lodge a form of order consistent with this decision for the Court's signature.

So ordered.

DATED: JAN 24 2006

CHARLES G. CASE II
United States Bankruptcy Judge

**COPY** of the foregoing mailed and/or via facsimile this ____ day of January, 2006, to:

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